Public Prosecutor v Lee Tak Keong

HIGH COURT (KUALA LUMPUR) – FEDERAL TERRITORY CRIMINAL APPEAL NO 52-58 OF 1987
ZAKARIA YATIM J
5 NOVEMBER 1988

Criminal Procedure – Sentencing – Two years' imprisonment for offence of gang robbery – Whether sentence manifestly inadequate and lacked deterrence – Whether public interest taken into consideration – Penal Code (FMS Cap 45), ss 34 & 395

The respondent was charged and convicted by the Sessions Court for an offence of gang robbery under s 395 of the Penal Code (FMS Cap 45). The facts were that the respondent and four other male persons surrounded the complainant and his friend and ordered them to go to a nearby field whereby the respondent then took $47 cash and an identity card from the complainant's wallet. The respondent was sentenced to two years' imprisonment and ordered to pay compensation in the sum of $50. The Public Prosecutor was dissatisfied with the sentence and appealed against the sentence, contending that it was manifestly inadequate and lacked deterrence.

Held, allowing the appeal:

(1) In cases of robbery, the court must take into consideration the element of public interest. The court is aware that in the present case, no dangerous weapons were used and the complainant and his friend were not injured. But the court must not overlook the fact that there were five of them who surrounded the complainant and his friend and committed the robbery. If the court does not impose a deterrent sentence, the respondent and his four friends may commit a similar offence. Furthermore, the court must also consider society's abhorrence of this type of crime.

(2) The sentence passed by the learned president was manifestly inadequate. The learned president failed to take into consideration the element of public interest. Having considered all the circumstances, the sentence is to be enhanced to five years' imprisonment from the date of his conviction. The respondent is also to be punished with six strokes of whipping.

Cases referred to

1 *Goh Chong Wee* v *PP* Federal Territory Criminal Application No CR 52-60-1987 (unreported) (refd)
2 *PP* v *Mustanina bin Daing Sinring & Anor* Criminal Application No 51-125 of 1987 (unreported) (refd)

Legislation referred to

Penal Code (FMS Cap 45) ss 34, 395

PL Tan (Deputy Public Prosecutor) for the Public Prosecutor.

Cur Adv Vult

Zakaria Yatim J: The respondent was charged in the Sessions Court, Kuala Lumpur with an offence of gang robbery under s 395 of the Penal Code (FMS Cap 45). The charge was that on 1 November 1986 at about 8.30 pm at Jinjang Utara, Kuala Lumpur the respondent, together with four other male persons who are still at large, with common intention under s 34 of the Penal Code committed gang robbery, and the amount of money robbed from the complainant was $47.

He claimed trial to the charge. At the end of the trial, he was found guilty. He was convicted by the learned president and sentenced to two years' imprisonment and ordered to pay compensation in the sum of $50.

The Public Prosecutor was dissatisfied with the sentence passed by the learned president and appealed against the said sentence.

The facts of the case may be summarized as follows. On 1 November 1986, at about 8.30 pm the complainant was at a pasar malam in Jinjang together with a friend. While they were there, they were surrounded by the respondent and four other male persons. The five male persons ordered them to go to a nearby field. In the middle of the field the complainant and his friend were asked to squat down. The respondent took $47 cash and an identity card from the complainant's wallet. After that the respondent and his friends left. The complainant went back to the house of his friend's father. There they told the friend's father what had happened. The complainant, his friend and his friend's father went back to the pasar malam. There they saw the respondent and his friends. They caught hold of the respondent and handed him to a detective constable who happened to be near the scene.

The learned president in his grounds of judgment stated that '... two years' imprisonment is in my view adequate in this case. The amount that was robbed off the complainant was only $47. Further the accused was a first offender'. He added that there was no necessity to impose whipping as no injury was inflicted on any person. The Public Prosecutor, in his petition of appeal stated that:

(1) the sentence imposed was manifestly inadequately;
(2) the sentence lacked deterrence; and
(3) the learned president did not consider the offence rampant and 'a threat to the security of the public'.

The learned deputy public prosecutor, in her submission, said that the public interest should be protected. Counsel for the respondent submitted that at the time the offence was committed the respondent was twenty years old. The respondent was a first offender. He added that no injury was caused, no weapon was used and therefore no violence. He also said that a term of two years' imprisonment was an inadequate sentence.

In my view, the offence committed by the respondent was a serious crime punishable with imprisonment for a term which may extend to twenty years under s 395. Under this section, the respondent was also liable to whipping.

The offence of robbery is rampant today and in most cases dangerous weapons are used. In some cases the victims of the robberies sustain injuries: see *Goh Chong Wee* v *PP*[1] and *PP* v *Mustanina bin Daing Sinring & Anor.*[2] In cases of robbery the court must take into

consideration the element of public interest. This means that the court must impose a deterrent sentence not only to deter the respondent from committing the same offence again but to deter others from committing the same type of crime. The court is aware that in the present case no dangerous weapons were used and the complainant and his friend were not injured. But the court must not overlook the fact that there were five of them who surrounded the complainant and his friend and committed the robbery. If the court does not impose a deterrent sentence the respondent and his four other friends may commit similar offences and they may even use dangerous weapons and inflict injuries on their victims.

I must add that in imposing sentence in this case, the court must also consider society's abhorrence of this type of crime.

The sentence passed by the learned president was manifestly inadequate. The learned president failed to take into consideration the element of public interest. I have taken into consideration that the respondent was a first offender and that he was only twenty years old when he committed the offence. I have also taken into consideration the submission made by his counsel.

Having considered all the circumstances in this case, I order that the sentence of two years passed by the learned president be enhanced to five years' imprisonment from the date of his conviction. I also order that the respondent be punished with six strokes of whipping. The order of the learned president that the respondent pay compensation in the sum of $50 is confirmed.

Appeal allowed.

Reported by *Ng Sheau Jiuan*

Chye Fook & Anor v Teh Teng Seng Realty Sdn Bhd

HIGH COURT (IPOH) – CIVIL SUIT NO 22-38-87
ABDUL MALEK J
27 SEPTEMBER 1988

Contract – Housing development contract – Sale of building lot – Breach of contract – Late completion of building – Notice to rescind contract – Whether plaintiffs can sue for rescission – Time the essence of contract – Housing Developers (Control and Licensing) Act 1966 – Contracts Act 1950, ss 56 & 76

By a consent order following a summons for directions, both parties had asked for the preliminary issue of 'whether the plaintiffs can sue for rescission on the agreement of 8 August 1984 as the house is not completed by 7 August 1986 which is the completion date' be first determined by arguments in open court. The agreement was signed on 8 August 1984 and the completion date was on 7 August 1986 which was 24 months after. The building was not completed on the completion date and the plaintiffs sent a notice to the defendants on 19 January 1987 to rescind the agreement in view of the non-compliance with the 24-month period. The building was finally completed in May 1987 and the certificate of fitness was issued on 9 December 1987. Clause 7 of the agreement provides, inter alia, that 'time shall be the essence of the contract in relation to all the provisions of this agreement'. Clause 18(2) of the agreement stipulates that 'if the vendor fails to deliver vacant possession of the said building in time the vendor shall pay immediately to the purchaser liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the purchase price'.

Held, allowing the application:

(1) Section 56 of the Contracts Act 1950 states that a contract is voidable at the option of the promisee if the intention of the parties was that time should be the essence of the contract but if it was otherwise the promisee is entitled to compensation from the promisor for any loss occasioned to him by the latter's failure to do the thing at or before the specified time. In this particular instance, the learned judge was of the view that the first limb of the section applied. Therefore, time was the essence of the contract and the contract was voidable. Consequently, since the building was not completed within 24 months from the date of the agreement, the plaintiffs had the option either to continue with the contract or to rescind it.

(2) As provided by s 76 of the Contracts Act 1950, a party who rightly rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract. The plaintiffs' entitlement to liquidated damages if the developer failed to complete within 24 months did not in any way take away the rights of the purchaser to rescind the contract.

(3) Having considered the facts, pleadings, affidavits, arguments and authorities, the learned judge gave a positive answer as regards the preliminary issued raised. There was no order as to costs. The learned judge also gave leave to the defendants to appeal.

[*Editorial Note*: Though leave to appeal was granted by Abdul Malek J to the defendants, the latter had later decided not to lodge an appeal.]

Cases referred to

1 *Mayson* v *Clouet & Anor* [1924] AC 980 (refd)
2 *Stickney* v *Keeble & Anor* [1915] AC 386 (refd)
3 *Johnson & Anor* v *Agnew* [1979] 1 All ER 883 (refd)
4 *City Investment Sdn Bhd* v *Koperasi Serbaguna Cuepacs Tanggungan Bhd* [1985] 1 MLJ 285 (FC); [1988] 1 MLJ 69 (PC) (refd)
5 *Beca (Malaysia) Sdn Bhd* v *Tan Choong Kuang & Anor* [1986] 1 MLJ 390 (refd)
6 *Sim Chio Huat* v *Wong Ted Fui* [1983] 1 MLJ 151 (refd)
7 *Tan Hock Chan* v *Kho Teck Seng* [1980] 1 MLJ 308 (refd)
8 *Yeow Kim Pong Realty Ltd* v *Ng Kim Pong* [1962] MLJ 118 (refd)
9 *Photo Production Ltd* v *Securicor Transport Ltd* [1980] AC 827 (refd)

Legislation referred to

Contracts Act 1950 ss 56, 76
Housing Developers (Control and Licensing) Act 1966
Housing Developers (Control and Licensing) Enactment 1978
Housing Developers (Control and Licensing) Rules 1970
Housing Regulations PU(A) 122/82